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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

UNION PATRIOT CAPITAL MANAGEMENT II, LLC et al., Plaintiffs and Respondents, v. RICHARD RIONDA DEL CASTRO et al., Defendants and Appellants.	B291109 (Los Angeles County Super. Ct. No. BC681300)

APPEAL from an order of the Superior Court of Los Angeles County, Barbara M. Scheper, Judge. Dismissed in part, affirmed in part.

Abrams Coate and Charles M. Coate for Defendants and Appellants Richard Rionda Del Castro, Hannibal Classics Inc., and Marco Polo Productions SAS.

Eisner, Christopher Frost and Blake Osborn for Defendant and Appellant Patricia Eberle Rionda Del Castro.

Loeb & Loeb and Barry E. Mallen for Plaintiffs and Respondents.

I. INTRODUCTION

Defendants, Hannibal Classics Inc. (Hannibal), Richard Rionda Del Castro (Richard), Patricia Eberle Rionda Del Castro (Patricia), and Marco Polo Productions SAS (Marco Polo), appeal from an order denying a motion to compel arbitration.[1] Plaintiffs Union Patriot Capital Management II, LLC (Union Patriot) and Justice Everywhere Productions LLC (Justice) sued defendants for breach of a sales agency agreement and other causes of action. After proceeding with litigation for over six months, defendants moved to compel arbitration pursuant to an arbitration clause in the sales agency agreement. Plaintiffs contended defendants by their litigation conduct had waived their right to demand arbitration. The trial court denied the motion to compel arbitration and defendants appeal from this ruling. We dismiss the appeal by Marco Polo and affirm the order as to the remaining defendants.

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[1] Patricia joined Hannibal and Richard's motions to compel arbitration and to stay litigation proceedings pending completion of arbitration. Marco Polo joined only Hannibal and Richard's motion to stay proceedings.

II. BACKGROUND

A. *Sales Agency Agreement*

Union Patriot and Justice are financier and producer, respectively, of a motion picture film entitled "Vengeance: A Love Story" (Vengeance). Plaintiffs entered into a February 3, 2016, Sales Agency Agreement (Agreement) with Hannibal. In the Agreement, Hannibal promised to act as an agent for Justice in connection with the sale of the distribution rights in Vengeance to foreign distributors. Richard is the chairman and chief executive officer of Hannibal and Patricia is Hannibal's president. Pursuant to paragraph 4 of the Agreement, Hannibal agreed to direct all foreign distributors to pay distribution proceeds directly into plaintiffs' collection account.

The Agreement includes the following arbitration clause: "[a]ny controversy or claim arising out of, or relating to, this Agreement, the breach thereof, or the validity of this arbitration provision, shall be settled by binding arbitration in Los Angeles, California before one neutral arbitrator in accordance with the JAMS Arbitration and Mediation Services and its expedited arbitration rules . . . and the judgment upon any award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof." Paragraph 27 of the Agreement provides that it "shall be deemed made in and is to be construed and interpreted in accordance with and governed by the internal laws of the state of California, applicable to contracts executed and to be performed therein."

B. *Litigation History Prior to Motion to Compel Arbitration*

1. Pleadings

On October 26, 2017, plaintiffs filed their original complaint in superior court against defendants for breach of contract, conversion, fraud, breach of fiduciary duty, and breach of the implied covenant of good faith and fair dealing. Plaintiffs alleged that Hannibal, at Richard and Patricia's direction, instructed distributors to pay distribution proceeds directly into Hannibal or Marco Polo's bank accounts, rather than into plaintiffs' collection account. Marco Polo is a French corporation owned by Hannibal, Richard, and Patricia. Plaintiffs attached the Agreement as an exhibit to the complaint.

After filing and serving the original complaint, on November 9, 2017, plaintiffs applied ex parte for a Right to Attach Order and Order for Issuance of Writ of Attachment against Hannibal, Richard, and Patricia. On December 4, 2017, Richard and Hannibal filed their opposition. On December 12, 2017, the trial court denied plaintiff's ex parte application.

On December 5, 2017, Hannibal and Richard filed their answer to plaintiffs' complaint, entitled "ANSWER, CLAIM OF OFFSET AS AFFIRMATIVE DEFENSE AND COUNTERCLAIM, DEMAND FOR JURY TRIAL." In addition to asserting 36 affirmative defenses, Hannibal and Richard asserted offset as "a separate, distinct affirmative defense and or counterclaims" (counterclaim). In the counterclaim, Hannibal and Richard alleged that plaintiffs were subsidiaries of Patriot Pictures LLC (Patriot) and based on various misdeeds by

plaintiffs and Patriot, Hannibal and Richard "have claims of offset against Patriot and [p]laintiffs in total well above the amount that is due . . . ." On January 16, 2018, plaintiffs filed an answer to Hannibal and Richard's purported counterclaim.

Also on December 5, 2017, Patricia separately answered plaintiffs' complaint. Patricia claimed as her 36th "affirmative defense and or counterclaim" an allegation that plaintiffs' claims were barred by the doctrine of offset. Hannibal, Richard, and Patricia did not raise arbitration in their answers, but instead demanded jury trial. All three parties sought an award of costs and attorney's fees.

On December 20, 2017, Richard moved to require plaintiffs to post an undertaking in the amount of $750,000. Richard contended that "there is no indication that [p]laintiffs will do anything other than proceed to trial. [Richard] expects to incur in excess of $750,000.00 to defend [p]laintiffs' case to completion, complete the discovery phase, the expert witness phase and to prepare this case for trial." Richard submitted a sworn declaration in support of his motion, which included the following statements: "A trial is anticipated and is estimated that it would take approximately 10-15 days. . . . [¶] . . . I reasonably expect to incur in my defense of this matter in the future anticipated attorney's fees and costs through trial, in the event that summary judgment on my behalf is not entered, to conservatively equal or exceed $750,000.00." On January 30, 2018, the court denied Richard's motion for plaintiffs to post an undertaking.

On December 29, 2017, plaintiffs moved for leave to file a first amended complaint. Hannibal and Richard opposed the motion for leave, and did not raise arbitration as a grounds for

their opposition. On January 29, 2018, the trial court granted plaintiffs' motion for leave to amend.

On January 25, 2018, and January 31, 2018, Hannibal and Richard, and Patricia, respectively, served their case management statements. The statements included an option for the parties to indicate, by check mark, whether they were willing to participate in mandatory binding arbitration. None of the defendants checked this box.[2]

On January 31, 2018, plaintiffs filed their first amended complaint against defendants.

On March 1, 2018, Hannibal and Richard demurred to seven causes of action in the first amended complaint. Also on March 1, 2018, Patricia separately demurred to five causes of action. On April 19, 2018, the trial court sustained in part the demurrers with leave for plaintiffs to amend their complaint.

On April 25, 2018, plaintiffs filed their second amended complaint, raising the same nine causes of action as in their first amended complaint.

On May 24, 2018, Marco Polo filed an answer to the second amended complaint, and again, did not seek arbitration. On May 25, 2018, Patricia filed her answer and also did not seek arbitration. Both Patricia and Marco Polo demanded a jury trial.

2. Discovery

On December 1, 2017, plaintiffs served discovery requests, including a deposition notice on Hannibal's head of business and legal affairs, Lindsey Roth, set for January 8, 2018. On

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[2] Defendants indicated that they were willing to participate in mediation.

December 6, 2017, plaintiffs served a deposition notice on Hannibal's person most knowledgeable, for January 12, 2018. On December 28, 2017, Hannibal and Richard's counsel, Charles Coate, met and conferred with plaintiffs' counsel, Barry Mallen, and plaintiffs agreed to extend defendants' time to respond to discovery to January 5, 2018.

On January 2, 2018, during a meet and confer between counsel, Coate indicated Hannibal and Richard would file a motion for protective order if plaintiffs did not agree to certain limitations on discovery. Defendants requested and plaintiffs denied a further extension of time within which to respond to discovery.

On January 5, 2018, Hannibal and Richard filed their motion for protective order, seeking to limit the number of special interrogatories, form interrogatories, and requests for production. On February 8, 2018, the trial court denied defendants' motion for protective order.

On March 8, 2018, plaintiffs moved to compel the deposition of Roth and Hannibal's person most knowledgeable. Plaintiffs asserted that defendants had refused, without justification, to make Roth and Hannibal's person most knowledgeable available for deposition. Plaintiffs requested that Roth and Hannibal's person most knowledgeable be compelled to appear for deposition no later than May 4, 2018. On April 4, 2018, Hannibal and Richard opposed the motion. On April 18, 2018, the trial court granted plaintiffs' motion and ordered Roth and Hannibal's person most knowledgeable to appear for deposition during the week of June 4, 2018.

Separately, after the court denied defendants' motion for protective order (to limit discovery), defendants indicated they

would not produce documents without a protective order (to protect confidentiality). On April 12, 2018, plaintiffs' counsel sent an email to defendants' counsel stating that they would stipulate to defendants' documents being confidential, and sent a proposed protective order. Defendants responded by requesting a "two-tiered" protective order, which plaintiffs described as allowing defendants to mark certain documents as for attorney's eyes only. Counsel for the parties engaged in several discussions from April to May 2018 regarding the form of the protective order. Ultimately, the parties could not agree on a protective order.

On May 10, 2018, plaintiffs sent a detailed meet and confer letter regarding the discovery disputes. Plaintiffs asserted that if defendants did not provide adequate responses by May 18, 2018, plaintiffs would move to compel discovery responses.

On May 21, 2018, Coate requested by email that plaintiffs stipulate to mandatory binding arbitration, pursuant to the Agreement's arbitration clause. The record indicates that this was the first instance in which any defendant requested arbitration. On May 23, 2018, plaintiffs' counsel Mallen informed Coate that plaintiffs would not so stipulate.

C. *Motion to Compel Arbitration*

On May 25, 2018, Hannibal and Richard filed a motion to compel arbitration, citing the Agreement, the Federal Arbitration Act, and the California Arbitration Act. Hannibal and Richard also sought to stay proceedings under Title 9 United States Code section 3 and Code of Civil Procedure section 1281.4. That same date, Marco Polo moved to join in Hannibal and Richard's motion

to stay the proceedings pending completion of arbitration, but did not move to join their motion to compel arbitration. On June 6, 2018, Patricia moved to join Hannibal and Richard's motion to compel arbitration and to stay proceedings.

Plaintiffs argued that defendants, by their litigation conduct, had waived their right to compel arbitration. Plaintiffs also argued that Patricia and Marco Polo, as nonparties to the Agreement, lacked standing to enforce the arbitration clause.

On June 21, 2018, the trial court denied defendants' motion to compel arbitration. The minute order issued by the court states in pertinent part: "CASE MANAGEMENT CONFERENCE; [¶] DEFENDANTS [RICHARD] AND [HANNIBAL]'S MOTION TO COMPEL ARBITRATION IN LIEU OF ANSW[E]R AND MOTION TO STAY PROCEEDINGS; [¶] DEFENDANT [PATRICIA]'S JOINDER TO DEFENDANTS[']MOTION TO COMPEL ARBITRATION IN LIEU OF ANSWER AND MOTION TO STAY PROCEEDINGS; [¶] Matter is called for hearing. [¶] Counsel are advised that a tentative ruling was not prepared as the Court was waiting for a reply. [¶] The Court gives a spoken tentative ruling. [¶] Counsel argue. [¶] The Court adopts its tentative ruling as the final order of the Court as follows: [¶] Defendants' Motion to Compel Arbitration is Denied." The record does not include a reporter's transcript or a settled or agreed statement of the June 21, 2018, hearing.

III. DISCUSSION

A. *Marco Polo Lacks Standing to Appeal*

Although an order denying a motion to compel arbitration is appealable (Code Civ. Proc., § 1294), only an aggrieved party has standing to appeal (*Id.*, §§ 902, 1294). Here, Marco Polo did not file a motion to compel arbitration and did not join in Hannibal and Richard's motion to compel. "A party who has an interest recognized by law that is adversely affected by the judgment or order is an aggrieved party. [Citation.] The interest must be immediate and substantial, and not nominal or remote." (*Serrano v. Stefan Merli Plastering Co., Inc.* (2008) 162 Cal.App.4th 1014, 1026-1027.) The trial court's order denying the motion to compel arbitration did not affect any asserted right by Marco Polo, as Marco Polo made no assertion of a right to arbitrate. Marco Polo thus lacks standing to appeal from the order denying the motion to compel arbitration. We will dismiss Marco Polo's appeal and further references to "defendants" will be to Hannibal, Richard, and Patricia.

B. *Inadequate Record on Appeal*

Plaintiffs argue that defendants' failure to designate an adequate record is fatal to their appeal. We agree. "A judgment or order of a lower court is presumed to be correct on appeal, and all intendments and presumptions are indulged in favor of its correctness." (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133; *Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956.) An appellant must affirmatively establish

error by an adequate record. (*Jameson v. Desta* (2018) 5 Cal.5th 594, 609; *Foust v. San Jose Construction Co., Inc.* (2011) 198 Cal.App.4th 191, 187; *Null v. City of Los Angeles* (1988) 206 Cal.App.3d 1528, 1532.) In the absence of a proper record on appeal, the appealable judgment or order is presumed correct and must be affirmed. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295-1296.)

Defendants contend that the trial court erred by finding they had waived their right to compel arbitration by their litigation conduct. Yet there is no record of the grounds for the court's denial of the motion to compel: the minute order does not state the basis for the trial court's order, there is no reporter's transcript of the proceedings, and there is no agreed or settled statement. (See Cal. Rules of Court, rule 8.120(b) [record of oral proceedings are either reporter's transcript, agreed statement, or settled statement].) Thus, we can, and do, affirm the denial of the motion on the grounds that defendants have failed to establish error by an adequate record.

C. *Even Assuming an Adequate Record, We Would Affirm*

Even if defendants had presented an adequate appellate record that demonstrated the trial court ruled defendants had waived their arbitration rights, we would affirm. We review a trial court's finding of waiver for substantial evidence. (*St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1196 (*St. Agnes*).)

Through their various filings, which included a counterclaim,[3] demurrer to the first amended complaint, a motion by Richard for plaintiffs to post an undertaking, and Richard's sworn declaration that he "reasonably expect[ed]" to incur fees and costs through summary judgment and trial, defendants substantially invoked the machinery of litigation and clearly expressed an intent to complete litigation to jury trial, which is inconsistent with a desire to arbitrate. During discovery, defendants refused to proceed with a deposition to which plaintiffs filed a motion to compel, made numerous requests to delay and limit discovery, and filed a motion for protective order, all without ever indicating that discovery was inappropriate because defendants sought to enforce their right to arbitrate. Finally, defendants requested arbitration only after actively engaging in litigation for six months, which prejudiced plaintiffs. Thus, substantial evidence supports a conclusion that defendants, by their litigation conduct, waived their right to arbitrate. (See *St. Agnes, supra,* 31 Cal.4th at p. 1196 [listing factors relevant to assessing a waiver claim]; *Christensen v. Dewor Developments* (1983) 33 Cal.3d 778, 784 ["'The courtroom may not be used as a convenient vestibule to the arbitration hall

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[3] Defendants, by alleging a cross-complaint in their answers, rather than filing a claim in a cross-complaint, were not entitled to affirmative relief. Nonetheless, defendants' conduct, which caused plaintiffs to file an answer, was not consistent with a desire to enforce an agreement to arbitrate.

so as to allow a party to create his own unique structure combining litigation and arbitration'"].)[4]

IV. DISPOSITION

Marco Polo Productions SAS's appeal is dismissed. The order denying the motion to compel arbitration is affirmed. Plaintiffs are entitled to recover their costs on appeal.

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KIM, J.

We concur:

BAKER, Acting P. J.

MOOR, J.

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[4] We need not reach the issue of whether Patricia, as a purported nonparty to the Agreement, had standing to enforce the arbitration clause. (See *Shaw v. Santa Cruz* (2008) 170 Cal.App.4th 229, 259, citing *Palermo v. Stockton Theatres, Inc.* (1948) 32 Cal.3d 53, 65 [declining to resolve matters unnecessary to appellate decision].)